UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERTAPE POLYMER CORP.		
and	Cases:	11-CA-077869
		11-CA-078827
UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC		10-CA-080133
		11-RC-076776

RESPONDENT'S STATEMENT OF POSITION FOLLOWING PARTIAL REMAND FROM THE FOURTH CIRCUIT COURT OF APPEALS

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I. INTRODUCTION

Respondent Intertape Polymer Corp. (IPG or Respondent) submits this statement of position in response to the National Labor Relations Board's (the Board) invitation following its acceptance of the partial remand from the United States Court of Appeals for the Fourth Circuit (the Fourth Circuit) in *Intertape Polymer Corp. v. NLRB*, 801 F.3d 224 (4th Cir. 2015). As discussed more fully below, the Board should amend the underlying order in this case to reflect that the election held on April 26 and 27, 2012, in Case 11-RC-076776 not be set aside and the results be certified.

II. SUMMARY OF FACTS

A. Election

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (the Union) filed a petition to represent a unit of production and maintenance employees at IPG's Columbia, South Carolina, plant on March 16, 2012. Pursuant to a stipulated election agreement, a secret ballot election was held on April 26 and 27, 2012. The tally of ballots showed 97 votes for, and 142 against, the Union, with three challenged ballots.

B. Unfair Labor Practice Charges and Objections

The Union filed a host of unfair labor practice charges with the Board between March 30 and July 25, 2012, alleging that IPG engaged in various acts of unlawful conduct during the campaign period. On May 4, 2012, the Union filed objections to the election, based largely on the allegations in the charges. The Board's Acting General Counsel (the General Counsel) issued a complaint on July 26, 2012.

The case was tried before an administrative law judge (the judge) in Columbia from October 9 to 12, 2012. The judge issued a decision on February 20, 2013, finding that IPG violated Section 8(a)(1) of the National Labor Relations Act (the Act) when (1) a group of managers allegedly engaged in surveillance of employees' union activities on April 24 and 25, 2012, by leafleting at the plant gate while union supporters were simultaneously handing out leaflets at that location; (2) Supervisor Bill Williams allegedly confiscated union literature from an employee break room in March 2012; and (3) Supervisor Williams allegedly interrogated employee Johnnie Thames about his union sympathies in February 2012. The judge also found that IPG violated Section 8(a)(1) when Senior Vice President of Administration Burge Hildreth allegedly threatened employees on March 25 and 26, 2012, that it would be futile to select the Union as their collective-bargaining representative.

The judge recommended that the Board order a rerun election given that the alleged unlawful confiscation of union literature, surveillance of union activities, and threat of futility constituted objectionable conduct occurring during the critical period prior to the election.[1] The judge recommended that the remaining allegations and objections be dismissed.

C. Board Decision

On May 23, 2014, a three-member panel of the Board issued an order adopting the judge's rulings, findings, conclusions, and recommended order in part and reversing in part. See *Intertape Polymer Corp.*, 360 NLRB No. 114, slip op. (2014). Specifically, the Board adopted the judge's findings that IPG violated Section 8(a)(1) by surveilling employees' union activities, confiscating union literature, and interrogating Thames, and that IPG engaged in objectionable

[1]Because Williams' alleged interrogation of Thames occurred before the critical period, it was not alleged or considered to be objectionable conduct affecting the election.

conduct with respect to the surveillance and confiscation violations.[2] Id. at 1. The Board also adopted the judge's findings as to all the allegations and objections he recommended dismissing. Id.

The Board rejected the judge's finding that IPG violated Section 8(a)(1) and engaged in objectionable conduct when Hildreth allegedly threatened employees that it would be futile to select the Union as their collective-bargaining representative. Id. at 3. Nevertheless, a panel-majority adopted the judge's recommendation that the election be set aside and a new election held.[3] Id.

D. Court of Appeals Decision

On May 29, 2014, IPG filed a petition for review of the Board's order with the Fourth Circuit. On June 10, 2014, the Board filed a cross-application for enforcement of the order. Following briefing and oral argument, the Fourth Circuit issued a published decision on September 8, 2015, granting IPG's petition in part and denying it in part, and granting the Board's cross-application in part and denying it in part. *Intertape*, 801 F.3d 224.

Specifically, the Fourth Circuit concluded that the Board correctly determined that Supervisor Williams unlawfully interrogated Thames and unlawfully confiscated union material from the break room, but erred in holding that IPG's managers engaged in unlawful surveillance of union activities. Id. at 241. Consequently, the Fourth Circuit remanded the case to the Board to modify its order in accordance with the Fourth Circuit's decision. Id. Further, because the Fourth Circuit's decision eliminated one of the two bases upon which the Board set aside the election, the Fourth Circuit instructed the Board to reconsider its decision to direct a second election. Id.

[2]Member Miscimarra dissented in part, stating that he would dismiss the interrogation and surveillance allegations. Id. at 506.

[3]Member Miscimarra stated that he would not order a new election. Id. at 5.

For his part, Judge Wilkinson wrote a poignant concurring opinion in which he expressed his displeasure with judicially construed administrative restrictions precluding the Court from directly overruling the Board's decision to order a new election. See id. ("I suggest . . . that the authority of circuit courts to review a Board's do-over election order at this stage of the proceedings warrants additional reflection and reexamination, bearing foremost in mind the need to restore a sense of balance between agencies and courts.").

Wilkinson also opined, without reservation, that "[o]rdering a new election after the first contest's landslide results, and on account of comparatively minor company violations, overstepped the Board's remedial discretion." Id. at 245. He explained that this was "all the more so where the Board's most critical finding supporting its direction of a new election [the alleged unlawful surveillance] has been overturned." Id. at 241. He agreed with the Board that IPG unlawfully expedited its break room clean up policy, but observed that "dozens of thinking employees did not vote differently because of a premature cleanup of a breakroom weeks before the election." Id. at 246. Wilkinson concluded by expressing his hope "that the Chief Judge's conscientious review of the Board's underlying unfair-labor-practice findings will cause the Board to withdraw its election re-run order on its own . . . ." Id. at 249.

E. Board Invitation

On January 26, 2016, the Board accepted the Fourth Circuit's partial remand and invited the parties to file statements of position with respect to the issue of whether the April 2012 election should have been set aside and a new election ordered given that only one unfair labor practice violation occurred during the critical period leading up to the election.

III. ARGUMENT

The Board should amend its decision, order, and direction of a second election in this case and hold that the April 26-27, 2012 election not be set aside and the results be certified. Applying well-established Board precedent, it is virtually impossible to conclude that the single violation of prematurely cleaning up the converting department breakroom one month before the election impacted the results.

A. Standard for Overturning Election

The Board's usual policy is to direct a new election whenever an unfair labor practice occurs during the critical period. *Clark Equipment Co.*, 278 NLRB 498, 505 (1986) (citing *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962)). However, the Board departs from this policy in cases where it is "virtually impossible to conclude that the misconduct could have affected the election results." Id. In determining whether misconduct could have affected the results of the election, the Board considers the number of violations, their severity, the extent of dissemination, the size of the unit, the proximity between the conduct and the election, and the closeness of the election. Id. (citing *Enola Super Thrift*, 233 NLRB 409 (1977)); see also *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1223 (2004).

B. Virtually Impossible To Conclude Supervisor Williams' Conduct Affected Election

In light of the Fourth Circuit's opinion, the only violation that occurred during the critical period leading up to the election involved Supervisor Bill Williams throwing away union flyers left by employee Faith Epps in the converting department breakroom on three occasions in March 2012. This single violation was minor, occurred well before the election, and affected a very small percentage of the voting unit. Consequently, it is "virtually impossible" to conclude that it affected the lop-sided results of the election.

1. Severity of violation

First, Williams' violation was far from severe. It did not involve threats, interrogation, or surveillance, nor did it involve discipline or discharge. See *PPG Aerospace Industries, Inc.*, 355 NLRB 103, 106 (2010) (observing that absence of unlawful discharge/discipline violations reduces potential impact of employer's misconduct on election). At worst, employees were not able to read whatever "pro-union" message was printed on the flyers that Epps left in the break room.[4] The Board has found conduct much more severe insufficient to warrant overturning an election. See, e.g., *Clark Equipment*, 278 NLRB at 498 (finding that isolated acts of interrogation, surveillance, and implied threats were not severe enough to affect election); *Recycle America*, 310 NLRB 629 (1993) (finding human resource manager's interrogation of employee and solicitation of grievances was not severe enough to affect election).

Further minimizing the impact of Williams' conduct is the fact that Epps gave copies of the flyers to employees who, according to Epps, claimed they were not able to get them from the breakroom because Williams threw them away. Specifically, Epps testified that, on at least two occasions, employees approached her and told her they wanted to "get some literature to read because every time they tried to get some out of the break room, it was being taken up . . . and they couldn't get to it" (Tr. 296). Consequently, Epps explained, she "would gather some up and put it in bags for them, and then after work, [she] would hand it to them" (Tr. 296).

Thus, by her own actions, Epps abated any potential negative impact Williams' conduct might have had on employees' ability to receive her campaign propaganda.

[4]There is no evidence in the record about the content of the flyer(s) Epps left in the break room. It is also unclear whether she left the same type of flyer each of the three days, or whether she left different types of flyers.

2. Extent of dissemination

Second, Williams' violation affected, at most, only a handful of employees out of the more than 250 eligible voters. The record does not establish exactly how many employees on each shift were in the converting department during the relevant time period; however, employee witness Shirley Gladden—who worked in the converting department and also reported to Bill Williams—estimated there were approximately 12 employees in her department (Tr. 159-160). But even that is not the true number of employees affected by Williams' conduct, because Williams only discarded flyers that Epps left for *half* of her department.

To be sure, Epps explained that her "side" of the converting department took their 10-minute break at 9:20, and the other "side" of the department took their 10-minute break immediately after that (Tr. 286, 309-311). According to Epps, the flyers that Williams threw away were intended for the employees on the other side of her department who took a break after her (Tr. 311).

Based on the record evidence, then, there were, at most, six employees who were deprived of reading the material Epps left out for that "side" of the department. See *PPG Aerospace*, 355 NLRB at 106 (no impact on election where violations affected only five employees in a unit of approximately 474); *Coca-Cola Bottling Co.*, 232 NLRB 717, 718 (1977) (certifying election despite interrogation of two employees in a 106 employee unit).

3. Proximity between violation and election

Third, Williams' violation occurred, at the latest, one month before the election. The Board has consistently found that even a two-week time period between violation and election seriously reduces the impact that such a violation could have on the results. See *Washington Fruit*, 343 NLRB at 1223 (violation occurring more than one week before election not sufficient

to affect results); *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001) (violation occurring two weeks prior to election not sufficient to affect results).

4. Closeness of vote

Finally, the Union lost the election by a wide margin: 142-97. See *Intertape*, 801 F.3d at 241 ("Intertape's margins in the first election were huge, and its infractions comparatively minor."). The Board has found that such lop-sided results significantly reduce the likelihood that unfair labor practices influenced the outcome. See *Flamingo Las Vegas Operating Co.*, 360 NLRB No. 41, slip op. at 4-5 (2014) (finding two unfair labor practice violations insufficient to affect results where employer won by 18 votes); *Longs Drug Stores California*, 347 NLRB 500, 503 (2006) (finding it virtually impossible to conclude that an unlawful handbook provision could have impacted election company won by 68 votes).

IV. CONCLUSION

In sum, the fact that, at most, a handful of employees out of a unit of over 250 did not have an opportunity to read flyers left by Epps on three occasions approximately one month before the election could not have possibly influenced the results. As the Fourth Circuit strongly suggested, the will of the employees on April 26-27, 2012, must be respected in situations like this. Consequently, the Board should amend the underlying order in this case to reflect that the original election not be set aside and the results be certified.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Reyburn W. Lominack, III, do hereby certify that I have on this 23rd day of February, 2016, caused to be served a copy of Respondent's Statement of Position Following Remand from the Fourth Circuit Court of Appeals upon the following by email:

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